REMARKS

This is intended as a full and complete response to the Office Action dated May 15, 2003, having a shortened statutory period for response set to expire on August 15, 2003. Please reconsider the claims pending in the application for reasons discussed below.

Claim Rejections - 35 USC § 112

Claims 1-2, 4-9, 15-21 and 23 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. Applicant has amended claims 1, 15, 17, 18 and 23 and submit the claims are now definite. Therefore, Applicant respectfully requests withdrawal of this rejection.

Claim Rejections - 35 USC § 101

Claims 1-2 and 15-20 are provisionally rejected under 35 U.S.C. § 101 as claiming the same invention as that of claims 1-9 of co-pending Application No. 10/011,605 (*Gysling*).

Claims 1-9 of the published '605 application limit the density meter "for use in an industrial sensing process." The online Patent Application Information Retrieval system indicates that these claims have not been amended to date. Applicant's claims 1-2 and 15-20 lack the limitation requiring use in an industrial sensing process. Therefore, different subject matter is claimed in each application due to the ability to literally infringe the claims of the present invention without literally infringing the corresponding claims within the '605 application (i.e. any use in a non-industrial sensing process). Accordingly, Applicant submits that claims 1-2 and 15-20 are in condition for allowance and respectfully requests removal of this rejection.

Claim Rejections – Obviousness-Type Double Patenting

Claims 4-14 and 21-25 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-13 of co-pending Application No. 10/011,605 (*Gysling*).

The judicially created doctrine of obviousness-type double patenting "requires rejection of an application claim when the claimed subject matter is not patentably distinct from the subject matter claimed in a *commonly owned* patent." (emphasis

added) In re Berg, 140 F.3d 1428, 1431, (Fed. Cir. 1998). This pending application and the '605 application lack common ownership as required by the judicially created doctrine of obviousness-type double patenting. A recorded assignment dated February 7, 2002, indicating separation of ownership between this application and the '605 application is available on reel 012601 and frame number 0731. Accordingly, Applicant submits the judicially created doctrine of obviousness-type double patenting does not apply and requests removal of this rejection.

Request for Allowance per MPEP 804

In the alternative, Applicant requests withdrawal of the provisional double patenting rejections under both 35 U.S.C. § 101 and the judicially created doctrine of obviousness-type double patenting since the provisional double patenting rejections provide the only rejection remaining after withdrawal of the rejection based on 35 U.S.C. § 112 as discussed above. The examiner should withdraw the double patenting rejection and permit the application to issue as a patent once the double patenting rejection is the only rejection remaining in that application. M.P.E.P. § 804 (I)(B) *Between Copending Applications- Provisional Rejections.* Therefore, Applicant believes that claims 1-2 and 4-25 are in condition for allowance and respectfully requests allowance of the same.

Having addressed all issues set out in the Office Action, Applicant respectfully submits that the claims are in condition for allowance. The prior art made of record is noted. However, it is believed that a detailed discussion of the secondary references is not deemed necessary for a full and complete response to this office action. Accordingly, allowance of the claims is respectfully requested.

Respectfully submitted,

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